No. 90-207

IN THE

Supreme Court of the United States

October Term, 1990

BRUCE BALL and BEVERLY BALL; ALVIN LLOYD BARTLETT, JR. and PATRICIA BARTLETT; HARRY ART BRUTCHER and COLLEEN BRUTCHER; STEVEN BRUTCHER and GLADYS BRUTCHER; FRED W. BUFFHAM and SANDRA BUFFHAM; DONALD G. BURDICK; GORDON F. CASEY and JOANNE CASEY; JEANETTE KOSTURIK, as Administratrix of the Estate of Mary Chmielewski, Deceased; JOHN F. COUGHLIN, SR. and LORRAINE COUGHLIN; KATHY FAZEKAS and KEITH FAZEKAS; RAYMOND GUILES; KARL W. HERSHEY and SHARON HERSHEY; DAVID P. HILFIKER and LAURIE HILFIKER; THOMAS HODSON and JUDY MAE HODSON; FRANK G. JOHNSON and BARBARA JOHNSON; DANIEL KAISER and BRENDA KAISER; DOUGLAS L. MARTIN and SUSAN MARTIN; DOUGLAS MEYERS; RICHARD MUNGER and KITTY MUNGER; LESLIE DAVID MYERS and FLORA MYERS; ROBERT PELLENZ and JOYCE PELLENZ; GLORIA RACE and GERALD RACE; CHRISTINE STEVENS, as Administratrix of the Estate of Charles Stevens, Deceased; PHILLIP STEVENS and LINDA STEVENS; JAMES SWITZER and KAY SWITZER; and LEE ROY PARODY,

Petitioners,

against

METALLURGIE HOBOKEN-OVERPELT, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Did the Court of Appeals for the Second Circuit correctly apply New York's general jurisdiction statute by employing the traditional "doing business" test to the facts of the instant case?

2. Did the Court of Appeals for the Second Circuit fully consider the record in concluding that Afrimet-Indussa, Inc. was not respondent's agent for jurisdictional purposes?

3. May petitioners properly raise for the first time in their Petition for a Writ of Certiorari a due process right to an evidentiary hearing on the jurisdictional issue?

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STATUTE:

NY Civil Practice Law and Rules Section 301 3

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Metallurgie Hoboken-Overpelt, S.A. [1] (hereinafter "MHO") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Second Circuit's opinion of this case. That opinion is reported at *Ball, et al. v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194 (2d Cir. 1990). The opinion of the District Court for the Northern District of New York is not published, but is available at *Ball, et al. v. Metallurgie Hoboken-Overpelt, S.A.*, 1989 U.S. Dist. LEXIS 9107 (N.D.N.Y. 1989). Both opinions are set forth in Appendices "A" and "B" to the Petition for a Writ of Certiorari (hereinafter "Petition"). References to these opinions will be made to the pages of the Petition at which they appear.

Statement of the Case

Respondent MHO disagrees with certain aspects of petitioners' Statement of the Case, particularly the assertion that "Afrimet is MHO's New York sales agent for distribution of MHO's product in New York the United States and Canada." Petition at p. 2. There is not now nor has there ever been a formal agency agreement between MHO and Afrimet and Afrimet does not have the authority to bind MHO contractually. Nor are there any of the formal trappings which are required to create a "true agency" relationship between the two entities.

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[1]Metallurgie Hoboken-Overpelt, S.A. ("MHO") is a Belgian public corporation whose shares are generally publicly traded or "to the bearer". Accordingly, it is not always possible to identify all MHO shareholders or whether there is a "parent corporation". However, Union Miniere, in all probability, owns approximately 60% of MHO's outstanding, publicly traded shares. MHO also has a number of affiliated and associated companies in which it owns shares. Of these companies, only Overpelt-Plascobel (OVP) can be considered a subsidiary other than a wholly-owned subsidiary (ownership of more than 50% and less than 100% of corporate shares). *See*, Supreme Court Rule 29.1.

In lieu of the Statement of the Case as presented by petitioners, MHO would adopt the Statement of the Case as set forth by the Court of Appeals for the Second Circuit under the heading "Background", which is included in the Petition at pages 3a-5a.

Summary of Respondent's Argument

Petitioners' arguments are unsubstantiated and unsupported. Both the district court and Second Circuit properly applied the law of the State of New York and the applicable New York jurisdictional statutes and, based on the record before them, correctly concluded that respondent was not subject to the court's *in personam* jurisdiction. Furthermore, petitioners' "due process" argument was not raised in the courts below and may not be considered on this Petition.

Reasons Why the Writ Should Be Denied

I.

The Court Below Correctly Applied the New York CPLR §301 Doing Business Tests.

Petitioners' first and second "Questions Presented" appear to suggest that the court below erred when it employed a "traditional 'doing business' test" in connection with its holding that MHO was not subject to *in personam* jurisdiction pursuant to Section 301 of the New York Civil Practice Law and Rules ("CPLR"). Petitioners suggest that the court should have employed some unspecified test other than the "traditional" test merely because "MHO is a sophisticated entity". There is nothing in the record or the Petition to support the conclusory allegation that MHO is a "sophisticated entity"; and peti-

tioners cite no case law supporting their suggestion that such entities should be subject to a different or higher degree of jurisdictional analysis under New York law.

The question of personal jurisdiction, in the first instance, is statutory and must be determined, in a diversity case, by reference to the revelant jurisdictional statutes of the State of New York. *United States v. First Nat'l City Bank,* 379 U.S. 378, 381-82 (1965); *Beacon Enters., Inc. v. Menzies,* 715 F.2d 757, 762 (2d Cir. 1983). *See also, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,* 484 U.S. 97, 105 (1987). The State of New York is free to define the jurisdictional limits of its courts in whatever manner it deems appropriate. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952); *Missouri Pacific R. Co. v. Clarendon Boat Oar Co.,* 257 U.S. 533 (1922); *Pulson v. American Rolling Mill Co.,* 170 F.2d 193 (1st Cir. 1948). There is, therefore, nothing objectionable about New York's adherence to traditional tests of doing business under CPLR §301, even where the net effect is to omit from the New York courts' jurisdictional reach foreign corporations which do not possess the "traditional indicia of doing business."

CPLR §301 is New York's general jurisdiction statute. In other words, a defendant subject to jurisdiction under CPLR §301 may be called before a New York court to answer for any cause of action, whether or not related to the defendant's contacts with the state. For this reason, the New York courts have required proof of facts establishing that the defendant is engaged in a continuous and systematic course of conduct in the State of New York which would warrant a finding of its actual presence in New York. *Delagi v. Volkswagenwerk AG,* 29 N.Y.2d 426 (1972); *Miller v. Surf Properties, Inc.,* 4 N.Y.2d 475 (1958). It is, therefore, a prerequisite to the imposition of jurisdiction under CPLR §301 that the foreign corporate

defendant do business in New York in the "*traditional* sense". *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536 (emphasis in original), *cert. denied*, 389 U.S. 923 (1967). Even the language of the statute itself, which provides that a "court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore", is indicative of the legislative intent that only those foreign corporations exhibiting the traditional indicia of doing business should be subjected to the general jurisdiction of New York's courts.

The petitioners concede that the courts "will not find traditional indicia of doing business" in the instant case. Petition at p. 4. Nevertheless, they urge imposition of jurisdiction under a statute which requires such indicia. Petitioners simply cannot seek refuge in a jurisdictional statute whose requirements they concededly do not meet.

II.

The Courts Below Correctly Concluded That Afrimet Is Not the Agent of MHO.

Petitioners claim that the courts below "erred in not considering all the acts that Afrimet did on behalf of and for the benefit of MHO" (Petition at p. 5) in coming to the conclusion that MHO was not "doing business" in New York by or through an agent, namely, Afrimet. Petitioners then list a number of "examples" of factors they claim the courts below failed to consider. The decisions below, however, belie this assertion.

The district court's opinion contains an extensive discussion of the relationship between MHO and Afrimet. *See*, Petition at pp. 20b-25b. The Second Circuit similarly engaged in an extensive discussion of petitioners' allega-

tions concerning the "agency relationship" between Afrimet and MHO. *See*, Petition at pp. 10a-12a. In both instances, the courts below found various of petitioners' allegations unsupported by the record, and ultimately found the record insufficient to establish an agency relationship between MHO and Afrimet.

Since the petitioners were unable to make a *prima facie* showing of common ownership between MHO and Afrimet, the existence of an express agency agreement between MHO and Afrimet, or Afrimet's ability to affirmatively bind MHO, the Second Circuit correctly concluded "that the relationship between Afrimet and MHO is [no] more than that of major distributor to manufacturer". Petition at p. 12a. These facts support neither an "inference of agency" nor a finding that MHO was actually "doing business", in the traditional sense, through an agent in the State of New York.

It is important to note that both the district court and the Second Circuit decided the issue of agency on the basis of the facts in the record before them. In a number of instances, the courts below simply found that the petitioners' allegations were unsubstantiated. Despite "fairly extensive discovery" (Petition at p. 3b), petitioners were unable to come forward with anything other than "bare legal allegations" (Petition at p. 11a), and failed to make a *prima facie* showing of jurisdiction. Petitioners' suggestion that the courts below did not consider certain aspects of the relationship between MHO and Afrimet simply underlines the fact that petitioners were incapable of demonstrating that this alleged agency relationship was anything more than a figment of petitioners' collective mind.

Petitioners' suggestion that the courts below should have employed any test other than one which considers

"the absence or presence of traditional indicia of agency", such as the ability of the agent to bind the principal, is unavailing. As noted above, it is the law of the State of New York that before a foreign corporation will be subjected to the general jurisdiction of the courts of New York pursuant to CPLR §301 by virtue of the in-state activities of its alleged "agent", particularly where there is no common ownership or agency agreement, the plaintiff must demonstrate that the relationship between the two entities satisfies the criteria, *i.e.*, the "traditional indicia", of an agency relationship. Petitioners failed to do so. Accordingly, the courts below properly rejected petitioners' position.

III.

Petitioners Were Not Denied Due Process and Cannot Raise Here For the First Time the Question of Whether an Evidentiary Hearing Is Required.

Finally, petitioners suggest that the failure of the district court to hold a hearing on the instant jurisdictional motion denied them due process. It is difficult to discern petitioners' reasoning on this point. Petitioners cite no precedent which mandates an evidentiary hearing on the jurisdictional issue. Instead, the case they do cite, *CutCo Indus. v. Naughton*, 806 F.2d 361 (2d Cir. 1986), is expressly to the contrary. The Second Circuit, in *CutCo*, held:

> Critical to [the] resolution [of the jurisdictional issue] is the proper approach to the conflicting factual claims that ordinarily arise when lack of personal jurisdiction is asserted. . . . Because the federal rules provide no statutorily prescribed course, the district court is free to decide the best

> way to deal with this question and its choice may be set aside on appeal only upon a finding of an abuse of discretion.

Id. at 364.

In any event, the issue of the necessity for a hearing on the jurisdictional motion was not preserved below in the Second Circuit. Petitioners did not raise this "due process" argument in their briefs before the Second Circuit, nor did they request a hearing before the district court. In point of fact, following discovery on the jurisdictional issue, petitioners cross-moved for summary judgment. Petitioners are therefore precluded from raising the issue for the first time in this Petition. *Ellis v. Dixon*, 349 U.S. 458, 460, *reh. denied*, 350 U.S. 855 (1955).

As the Second Circuit noted, on a motion for summary judgment, the court is required "to determine if undisputed facts exist that warrant the relief sought. If the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence." Petition at p. 7a. In the instant case, the necessity for a hearing on jurisdictional issues never arose, because the petitioners never came forward with factual allegations sufficient to constitute a *prima facie* showing of jurisdiction. Therefore, there were no relevant factual allegations for MHO to contest. Instead, it was MHO's position, in both the district court and the Second Circuit, that petitioners never made out a *prima facie* showing.

For example, on the issue of the alleged agency relationship between MHO and Afrimet (to which petitioners have apparently limited their arguments on this Petition), the district court held that, on the record before it, peti-

tioners had failed to substantiate their claims of common ownership between Afrimet and MHO (Petition at p. 21b), their allegations of MHO's control over Afrimet's marketing and sales terms (Petition at p. 22b), and their allegations that Afrimet was authorized to contractually bind MHO (Petition at p. 24b). Since petitioners did not make a *prima facie* showing on any of these prerequisites to a finding of agency, a hearing would be superfluous. In other words, even accepting petitioners' factual allegations, as opposed to their legal conclusions, as true, the courts below correctly held that petitioners had not demonstrated an agency relationship between MHO and Afrimet. Accordingly, the need for a hearing never arises, and petitioners' complaint was properly dismissed.

Conclusion

For these reasons the Petition for a Writ of Certiorari should be denied.

Dated: Binghamton, New York
August 22, 1990

Respectfully submitted,

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